
**In the Supreme Court
OF THE
United States**

OCTOBER TERM, 1982

PHOENIX BAPTIST HOSPITAL AND
MEDICAL CENTER, INC.

Petitioner,

vs.

SHS HOSPITAL CORPORATION, JCL HOSPITAL
CORPORATION AND LINCOLN SAMARITAN HOSPITAL
AND HEALTH CENTER,

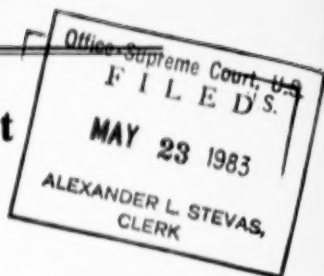
Respondents.

**BRIEF FOR RESPONDENTS IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

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RESTATEMENT OF QUESTIONS PRESENTED

The questions presented to this Court must be restated to take into account the following facts found to be undisputed by the lower courts:

(a) No new hospital could be built in the State of Arizona unless a certificate of need therefor was applied for and obtained from the State, which actively supervised the certificate of need application process;

(b) The certificate of need process implemented important health planning policies clearly articulated and mandated by federal and state statutes;

(c) Federal and state health planning policy and the resulting certificate of need statutes sanctioned and encouraged cooperation among health care providers;

(d) Procedures for the review of certificate of need applications, including administrative hearings and judicial review, complied with all requirements of due process;

(e) Respondents SHS Hospital Corporation and JCL Hospital Corporation were organized solely for the purpose of entering into an unincorporated joint venture, known as Lincoln Samaritan Hospital and Health Center, to petition the State of Arizona for a certificate of need required to build a new hospital; and

(f) Specific procedures followed in the instant case were regular in every way, so that each competing applicant for a certificate of need, including both petitioner and respondents, received from the State of Arizona full due process consideration of its own application, as well as due process consideration for its opposition to competing applications.

Accordingly, it is respectfully submitted that the questions presented must be restated as follows:

1. Whether the activities surrounding the successful application by a joint venture, formed solely for that purpose, for a certificate of need in a comparative review process conducted by the State of Arizona for the purpose of allocating a limited number of permitted new hospital beds were immune from federal antitrust liability under the state action doctrine?

2. Whether the participation of respondents in successfully petitioning the State of Arizona for a certificate of need and in successfully opposing petitioner's applications for certificates of need, all in compliance with statutorily-established due process procedures, was immune from federal antitrust liability under the *Noerr-Pennington* doctrine?

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COUNTERSTATEMENT OF THE CASE

Brief Procedural History

In its first amended complaint filed in the United States District Court for the District of Arizona, petitioner named as defendants: Samaritan Health Service (then the ultimate "parent" of respondent SHS Hospital Corporation ("SHS")), John C. Lincoln Hospital (then the ultimate "parent" of respondent JCL Hospital Corporation ("JCL"))¹, all three respondents, and four other corporations affiliated with Samaritan Health Service.

On September 23, 1981, Judge Walter E. Craig entered an

¹ On September 15, 1981, all claims against John C. Lincoln were dismissed with prejudice upon stipulation of petitioner.

order [Pet. App. C at C-1] dismissing the complaint as to, or in the alternative granting summary judgment in favor of, only the three respondents. Samaritan Health Service and its four other affiliates remain as defendants in the still on-going district court action.

Petitioner appealed the dismissal as to respondents, and on August 25, 1982, the Ninth Circuit issued its memorandum decision affirming the district court's action. [Pet. App. A at A-1] Petitioner's request for a rehearing and for a rehearing en banc was rejected by the Ninth Circuit in an order dated December 28, 1982. [Pet. App. B at B-1]

No Disputed Facts

In its present petition as well as throughout the proceedings below, petitioner has continued to allege, in only vague generalities and conclusory assertions, the existence of disputed facts. However, after consideration of the complete record below, the court of appeals found that the only operative facts relevant to its decision consisted of:

(1) The participation by SHS and JCL in an unincorporated joint venture, known as Lincoln Samaritan Hospital and Health Center, for the purpose of applying to the state for a certificate of need, and

(2) The successful support by respondents of their own certificate of need application and the successful opposition by respondents to the petitioner's certificate of need applications before the state administrative agencies charged with the review of such applications.²

Such facts were a matter of public record, and both the district court [Pet. App. C at C-2] and the Ninth Circuit [Pet. App. A at A-4] found that there were no disputed issues of material fact. Where, as here, both the lower courts have concurred in finding no disputed issues of material fact, such a finding will be accepted by

² Given such a limited set of relevant operative facts, it is difficult to conceive of any harm to petitioner caused by the district court's stay of discovery, notwithstanding petitioner's vague assertions to the contrary. [Pet. Br. at 7]

this Court as conclusive and will not be reviewed unless there is a very obvious and exceptional showing of error. *See, e.g., Branti v. Finkel*, 445 U.S. 507, 512 n.6 (1980) (Court declined to review findings of fact in which both lower courts concurred in spite of allegations findings were clearly erroneous); *Graver Tank & Mfg. Co. v. Linde Air Prods. Cos.*, 336 U.S. 271, 275 (1949) (same); 17 Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction* § 4036.

Pervasive Participation of State of Arizona in Certificate of Need Process.

In the National Health Planning and Resource Development Act of 1974 (the "Health Planning Act") [42 U.S.C. §§ 300k-300n-6], Congress expressed its skepticism that free competition is effective in properly allocating certain health care services, particularly inpatient care:

(2) For health services, such as inpatient health services and other institutional health services, for which competition does not or will not appropriately allocate supply consistent with health systems plans and State health plans, health systems agencies and State health planning and development agencies should in the exercise of their functions under this subchapter take actions (where appropriate to advance the purpose of quality assurance, cost effectiveness, and access and the other purposes of this subchapter) to allocate the supply of such services.

[42 U.S.C. § 300k(b)(2)]

As a result, the Health Planning Act requires each state, among other things, (1) to review the need for construction of new health care facilities and (2) to establish a certificate of need program to prevent unnecessary duplication of health care services in the state. [42 U.S.C. § 300m-1, m-2] In response to and consistent with that federal mandate, the State of Arizona adopted a certificate of need process preventing any health care provider from constructing a new hospital without first obtaining from the State of Arizona a

certificate of need authorizing such construction. [A.R.S. § 36-433 *et seq.*]³

The Arizona statutes required a certificate of need applicant to submit its application both to the Arizona Department of Health Services (the "Department") and to the local health systems agency ("HSA").⁴ [A.R.S. § 36-433] The HSA was then directed by the statute to review the application through a public hearing process and make recommendations to the Department with respect to granting or denying each such application. [A.R.S. § 36-433.01] Following review of each application by the HSA, the Director of the Department (the "Director") would, if requested by the applicant, conduct further public hearings on the application and thereafter issue a decision granting or denying the application. [A.R.S. § 36-433.02] An applicant was entitled under Arizona law to seek judicial review of the Director's final decision. [A.R.S. § 12-901 *et seq.*]

Thus, pursuant to plainly articulated national and state policy, Arizona continually evaluates the health care needs of each area of the state and is entirely responsible for the allocation of construction permits for new health care facilities. [Pet. App. A at A-6] A more pervasive system of state regulation replacing unfettered competition is difficult to imagine.

Certificate of Need Requirements for Cooperation Among Health Care Providers.

In recognizing the failure of open competition to operate effectively in health care markets, the federal and state certificate

³ A.R.S. § 36-433 was first adopted in 1975 and has been amended from time to time. Unless otherwise stated herein, the Arizona statutes and regulations referred to herein are those which were in effect during 1979. The statutes and the corresponding regulations promulgated in response thereto, are reproduced in Appendix A to this Brief in Opposition ("Opp."). [Opp. App. A at A-2]

⁴ An HSA is a non-profit private corporation which, under a federally-funded contract, is designated under the Health Planning Act as the agency to conduct and supervise the health planning activities in the area of the state in which the HSA operates (for example, in the Phoenix metropolitan area, the designated HSA was the Central Arizona Health Systems Agency). [Health Planning Act, 42 U.S.C. § 3001]

of need statutes replace such competition, as described above, with pervasive regulation of entry into and expansion within the health care market in order to prevent the needless and costly duplication of health care services. [See Senate Report No. 1285, 93rd Cong., 2nd Sess. 39, reprinted in [1974] U.S. CODE CONG. AND AD. NEWS, 7842, 7878-79] Consistent with the policy to avoid such duplication of services, the Health Planning Act encourages the development of "multi-institutional systems for coordination or consolidation of institutional health services." [Health Planning Act, 42 U.S.C. § 300k-2(A)(2), (5)]

Implementing that federal mandate, the State of Arizona, by statute, requires certificate of need applicants to cooperate, or attempt to cooperate, with other area health care providers. Thus, the applicant for a certificate of need in Arizona must certify on the application that it "has reviewed, or attempted to review, the proposed construction or modification with other health care institutions in the area to be served *for the purpose of exploring the feasibility of coordinating with such institutions' programs, services or facilities.* . . ." [A.R.S. § 36-433.C.9, Opp. App. A at A-4; A.C.R.R. R9-9-30.1(f), Opp. App. A at A-9] By such a requirement, the state is attempting through its regulatory process to prevent the duplication of certain health care services by mandating cooperation rather than competition.

1979 and 1980 Certificate of Need Applications.

The only activities in which respondents participated prior to the bringing of petitioner's lawsuit involved certificate of need applications filed in the years 1979 and 1980. The facts relevant to those applications are reviewed in the Ninth Circuit's Memorandum Decision [Pet. App. A at A-2-A-4] and summarized below.

In response to the Central Arizona Health System Agency's 1978-84 Bed Plan (the "1978 Plan") which predicted the need for only an additional 369 hospital beds by 1984 in the metropolitan Phoenix area, Samaritan Health Service and John C. Lincoln Hospital proposed the joint construction of a new hospital. Thus, SHS and JCL were incorporated in January, 1979; it was they who were parties to the joint venture and the applicants for a certificate of need. [Pet. App. A at A-3]

A total of 15 certificate of need applications, including petitioner's and respondents', were filed with the Department in 1979 seeking authority to add a total of 1,499 hospital beds to the area, four times the number needed according to the 1978 Plan. In the ensuing comparative review procedure, adopted by the Department consistent with *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945), the Department granted certain of the 15 applications, including respondents', and denied the others, including petitioner's. (The Director's final decision following the comparative review procedure setting forth the details of the 1978 Plan, the resulting review procedures, and the rationale for the decision is found in Appendix B hereto at B-2.) Certain of the applicants whose applications were denied by the Director sought state judicial review of the decision; however, petitioner did not.

In 1980, petitioner submitted a new application seeking authority to add 91 hospital beds to its existing facility. The respondents, among others, successfully opposed the application on the basis that construction by respondents of their new hospital would obviate the need for any additional beds in petitioner's hospital. The Director agreed with respondents, and petitioner's application was denied. [Findings and Order of Director, Opp. App. B at B-13] Petitioner sought state judicial review, which is still pending; however, so far the state court has affirmed the Director's decision, so that petitioner continues to be unsuccessful in the state certificate of need process.

Decision of the Ninth Circuit Court of Appeals.

Upon review of the circumstances surrounding the 1979 and 1980 certificate of need applications, the Ninth Circuit ruled that the district court's decision was appropriate because the undisputed facts indicated that the conduct of the respondents was insulated from any antitrust liability. More specifically, the appellate court ruled that (1) the actions of the respondents in opposing petitioner's applications for certificates of need were conducted without any abuse of the administrative process and without any indication of bad faith and, thus, were clearly activities protected from antitrust liability under the *Noerr-Pennington* doctrine; and (2) the activities

surrounding the joint application by respondents for a certificate of need were likewise immune from antitrust liability under the state action doctrine of *Parker v. Brown*. [Pet. App. A at A4-A7]

ARGUMENT

- I. ENTIRELY CONSISTENT WITH THE DECISIONS OF THIS COURT AND OTHER COURTS OF APPEAL, THE NINTH CIRCUIT CORRECTLY HELD UNDER THE FACTS OF THIS CASE THAT THE ACTIVITIES UNDERTAKEN BY RESPONDENTS PURSUANT TO A CLEARLY ARTICULATED POLICY OF THE STATE OF ARIZONA IN AN ENVIRONMENT ACTIVELY SUPERVISED BY THE STATE WERE IMMUNE FROM ANTITRUST LIABILITY.

- A. *The Ninth Circuit's Opinion With Respect To Immunity Based On A State Action Defense Is Entirely Consistent With The Standards For Such A Defense Established By This Court.*

In accord with a system of federalism, this Court recognized that acts performed pursuant to "the legislative command of the state" would be exempt from antitrust liability under the "state action" immunity announced in *Parker v. Brown*, 317 U.S. 341, 351 (1943). After developing the state action doctrine in a number of later cases, this Court adopted a two-step test for determining state action immunity in a unanimous 1980 decision. *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980) ("Midcal"). First, the acts for which immunity is sought must be taken pursuant to a state policy which is "clearly articulated and affirmatively expressed"; second, the state must "actively supervise" the policy. *Id.* at 105. The Ninth Circuit ruled that in this case both tests were clearly met. [Pet. App. A at A-6]

Midcal and the cases it cites establish that when enforcement of antitrust policies would severely impinge upon the effectiveness of a clearly expressed state policy, particularly a policy designed to displace unfettered competition, state action immunity is available. 445 U.S. at 105; *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 400 (1978) (system of federalism prohibits antitrust laws from impinging upon enforcement of significant state policies). Nowhere in the *Midcal* test is compulsion even mentioned

as determinative of the state action defense. Indeed, in only one of the earlier decisions of this Court cited by petitioner does "compulsion" appear relevant to the decision. *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975). However, even in *Goldfarb*, the issue of compulsion was not determinative since the Court stressed that, with respect to the restraint involved, there was simply no clearly articulated policy of the state, the effectiveness of which would be hindered by an enforcement of antitrust policies. *Id.* at 790-791. Certainly, in reviewing and synthesizing its earlier decisions this Court in *Midcal* did not find compulsion to be determinative of the existence of the state action exemption.⁵

"Unlike an arbitrary compulsion requirement, the *Midcal* test affords states greater flexibility in the formation of constructive regulatory programs so long as the state clearly and affirmatively expresses its intent to do so and remains continuously and actively involved. *Midcal* demands a very high degree of state involvement before state action immunity may be claimed. The Court did not purport to expand application of the doctrine, or to overrule *Goldfarb*. Instead, *Midcal* simply clarifies that the focus for immunity purposes should be upon the extent of the state's involvement in the challenged activity — that is upon the kind of imprint of state authority the anti-competitive activity bears. Compulsion certainly remains a relevant factor in this determination. Indeed, it is the best evidence that a challenged restraint is a 'clearly articulated and affirmatively expressed' state policy. As Professor Areeda has

⁵ The idea that compulsion should be an additional requirement or exclusive means by which the required "clearly articulated state policy" may be inferred is, in the view of Professor Milton Handler and others, merely:

"an overreaction to [Justice] Stone's caveat in *Parker* that a state cannot 'authorize' private parties to violate the antitrust laws. This may be true if the state's involvement stops at that point; however, authorization, approval or permission, if coupled with a valid regulatory purpose and other measures which insure against unbridled anti-competitive decision making by private parties, should normally be enough to bring *Parker* into play. The compulsions of law exist even when they take the form of approval or authorization."

Handler, "Antitrust — 1978," 78 Colum. L. Rev. 1363, 1384 (1978). See also P. Areeda & D. Turner, *Antitrust Law* ¶ 2.15b at 92-97 (1978).

observed, after *Midcal*, 'literal compulsion is powerful evidence, if not determinative, of the existence of state policy, but is neither necessary nor sufficient for *Parker* immunity.' [Citations omitted]

"Clearly, 'a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful.' *Parker*, 317 U.S. at 351, 63 S. Ct. at 314. The Court in *Midcal* recognized this limitation on state action immunity, 445 U.S. at 106, 100 S. Ct. at 943-944, and thus formulated a test which examines the extent of the state's involvement at two levels — first, at the level of articulation of state policy in favor of the challenged restraint and second, at the level of implementation of that policy through active supervision. Significant involvement at both levels is necessary to support a state action exemption. And it is the combination of these two criteria that effectively guarantees that the state has considered the course of its conduct and has chosen to replace open market pricing with state regulation. Hence, the balance struck in *Midcal* between the federal policy of competition and state sovereignty is thus: the state may choose to displace competition with economic regulation by making clear its intention to do so; having made that choice, however, the state bears the burden of ensuring that this policy is furthered and that the state itself remains the ultimate decision maker."

United States v. Southern Motor Carriers Rate Conference, Inc., ____ F.2d ____, [1983-1] Trade Cas. ¶ 65,320 at pp. 69,896-69,897 (5th Cir. 1983) (*en banc*) (Hill, J., dissenting).

In applying *Midcal*, the Ninth Circuit found that the State of Arizona has adopted a clearly articulated policy which replaced unfettered competition in the construction of new hospitals with a certificate of need application process. [Pet. App. A at A6] Indeed, the policy of the State of Arizona *required* certificate of need applicants (1) to seek opportunities to cooperate with other health care providers in the provision of new hospital facilities or services, and (2) to apply for and obtain a certificate of need before constructing new facilities or offering new services. The Ninth Circuit also found that the certificate of need regulatory scheme was actively and continually supervised by the State. [Pet. App. A at A-6] Thus, the

state action exemption defined by this Court in *Midcal* and earlier decisions was correctly analyzed by the Ninth Circuit on the clearly established, undisputed facts before it.

Moreover, in this case unlike the typical state action case in which no federal policy is being implemented, a finding of immunity for such health planning activities is particularly appropriate because the Arizona policy implements a federal policy mandated by statute. In *National Gerimedical Hospital and Gerontology Center v. Blue Cross*, 452 U.S. 378 (1981), this Court recognized that unless certain health planning activities were granted immunity from antitrust laws, the Congressional intent in passing the Health Planning Act may be frustrated. Indeed, this Court specifically stated in *National Gerimedical* that the type of activity involved here, cooperation among health care providers, may be the best example of activity requiring such immunity, so that the national health planning policies and the resulting state policies can be effective. 452 U.S. at 393 n.18 (1981) ("Where, for example, an HSA has expressly advocated reform or cost-saving cooperation among providers, it may be that antitrust immunity is 'necessary to make the [Health Planning Act] work.' [Citations omitted.]"). *National Gerimedical*, thus, not only forecasts immunity from antitrust liability for exactly the type of activity involved in this case, but it also indicates that such immunity is *not* predicated upon compulsion. 452 U.S. at 389 (activities not immune because *neither compelled nor approved*).

B. *The Ninth Circuit's Opinion Does Not Conflict With The Decisions Of Other Circuits With Respect To State Action Immunity.*

As with the decisions of this Court, petitioner has misstated the formulation of the state action defense in other circuits. With the exception of the Fifth Circuit, other circuits have not adopted compulsion as a required element of the state action immunity defense.⁶

⁶ In the following cases cited by petitioner, compulsion is not determinative of the state action defense: *Huron Valley Hospital, Inc. v. City of Pontiac*, 666 F.2d 1029, 1034 (6th Cir. 1981), *rev'd* 466 F. Supp. 1301 (E.D. Mich. 1979)

The only circuit which has ruled that compulsion is a required element of the state action immunity is the Fifth Circuit. *United States v. Southern Motor Carriers Rate Conference, Inc.*, ____ F.2d ____, [1983-1] Trade Cas. ¶ 65,320 (5th Cir. 1983) (*en banc*). And that ruling was not unanimous. Three judges vigorously dissented on the ground that the majority contradicted this Court's opinion in *Midcal*.

Nonetheless, even if petitioner were correct in its assertion regarding the necessity of a finding of compulsion, there is still no conflict between such a requirement and the decision of the Ninth Circuit in this case. Here, in its memorandum decision, the court did *not* reject compulsion as an element of the state action defense, in spite of Petitioner's allegations to the contrary. The Ninth Circuit's decision would have been the same, whether or not "compulsion" played a role in the state action defense, because the court noted that with respect to respondents' activities, the certificate of need was *required* by the state. Whether the involvement of the respondents' respective parents (which are still before the district court) in forming a joint venture was immune from liability was not an issue before the court. [Pet. App. A at A-6 n.3] Thus, there is no

(court simply remanded decision to the district court, stating that the district court was incorrect in ruling that health care activities enjoyed blanket immunity from antitrust policies, but cited *National Gerimedical* for proposition that selective immunity for certain activities may exist); *New York State Elec. & Gas Corp. v. FERC*, 638 F.2d 388, 399 (2d Cir. 1980), *cert. denied*, 454 U.S. 821 (1981) (neither prerequisite of *Midcal* test met; "no suggestion that the challenged restraint itself was mandated by, or even related to, state policy" (emphasis added)); *Virginia Academy of Clinical Psychologists v. Blue Shield*, 624 F.2d 476, 482 n.10 (4th Cir. 1980), *cert. denied*, 450 U.S. 916 (1981) (restraint not protected under state action because there was no state policy at all which would have been frustrated by enforcement of antitrust statutes); *City of Fairfax v. Fairfax Hospital Ass'n*, 562 F.2d 280, 284 (4th Cir. 1977), *vacated*, 435 U.S. 992 (1978), *on remand*, 598 F.2d 835 (4th Cir. 1979) (activity to be immune under state action must be compelled or regulated by state); *Hennessey v. National Collegiate Athletic Ass'n*, 564 F.2d 1136, 1149 (5th Cir. 1977) (activity to be immune must be "required or intended"); *Kurek v. Pleasure Driveaway & Park Dist.*, 557 F.2d 580, 589 (7th Cir. 1977), *vacated*, 435 U.S. 992, *on remand*, 583 F.2d 378 (7th Cir. 1978), *cert. denied*, 439 U.S. 1090 (1979) (antitrust immunity sought by park district was denied because park district was not a state agency and because its actions were not undertaken by the state's command or were not anticompetitive restraints resulting from such actions).

conflict between the Ninth Circuit's opinion or result in this case and the decisions of the other circuits, including the Fifth Circuit.

II. THE NINTH CIRCUIT'S OPINION CORRECTLY HELD THAT THE RESPONDENTS' ACTIVITIES BEFORE STATE AGENCIES WERE IMMUNE FROM ANTITRUST LIABILITY UNDER THE *NOERR-PENNINGTON* DOCTRINE.

Petitioner has incorrectly represented that the Ninth Circuit has immunized from antitrust liability some ill-defined gross conspiracy in which respondents are alleged to have participated. In doing so, petitioner has once again ignored the undisputed facts recognized both by the district court and the appeals court that the only activities in which respondents engaged were (1) activities surrounding the joint application for a certificate of need and (2) the opposition by respondents before state agencies to petitioner's similar certificate of need applications.⁷ Since the Ninth Circuit found the former activities fully immunized from antitrust liability under the state action doctrine, it only considered the latter activities, viz opposition to petitioner's certificate of need applications, with respect to immunity under *Noerr-Pennington*.

In making its determination, the Ninth Circuit found the actions of the respondents to fall squarely within the doctrine of *Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) and *United Mine Workers v. Pennington*, 381 U.S. 657 (1965), permitting respondents to exercise their First Amendment rights by opposing petitioner's applications before governmental bodies without regard to their potential anti-competitive effect.

"The actions of [respondents] in opposing [petitioner's] application to build additional space fall squarely within the doctrine of *Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) and *United Mine Workers v. Pennington*, 381 U.S. 657 (1965). These and subsequent author-

⁷ Moreover, petitioner fails to mention that the only harm to petitioner resulted not from any acts of respondents but from the act of the state in denying petitioner's own certificate of need applications.

ities clearly establish the rights of persons or commercial enterprises to participate in governmental administrative or adjudicatory processes without regard to their anticompetitive effects. This right to petition government, grounded in the first amendment, is only lost where the participation is a "sham," a bad-faith campaign solely designed to harass a competitor attempting to obtain a governmental benefit. *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 515 (1972); *Franchise Realty v. San Francisco Local Joint Executive Board*, 542 F.2d 1076, 1082 (9th Cir. 1976).

The facts surrounding [respondents'] participation in the 1980 administrative proceedings, resulting in denial of [petitioner's] request to expand, do not indicate a bad faith campaign, a groundless or "frivolous" attempt to influence the administrative process sufficient to bring the case within the "sham exception" to the *Noerr-Pennington* [sic] rule. See *Ernest W. Hahn, Inc. v. Coddling*, 615 F.2d 830, 842 (9th Cir. 1980). This conclusion is reinforced to some extent by the fact that [respondents] were successful in their single attempt to influence the process. *Id.*, 615 F.2d at 841 n.13; *Clipper Express v. Rocky Mountain Motor Tariff Bureau, Inc.*, 674 F.2d 1252, 1264-65 (9th Cir. 1982)."

[Pet. App. A at A4-A5]

In examining the facts surrounding such opposition, the Ninth Circuit found no evidence of a bad faith campaign or of a groundless or frivolous attempt to influence the administrative process sufficient to bring the case within the "sham exception" of the *Noerr-Pennington* rule described by this Court in *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 515 (1972). [Pet. App. A at A5] Indeed, given the undisputed facts in this matter, it is difficult to imagine a set of circumstances more fully contemplated by the *Noerr-Pennington* exception to antitrust liability.

Petitioner has implied that the Ninth Circuit's opinion is in conflict with decisions of two other circuits interpreting the *Noerr-Pennington* defense in the health care environment. Again, petitioner has misstated the holdings in each of those decisions. In the Sixth Circuit case cited by petitioner, the court merely stated that the district court was not justified in granting blanket immunity from antitrust laws based on the provisions of the Health Planning Act.

Huron Valley Hospital, Inc. v. City of Pontiac, 666 F.2d 1029 (1981). The court did not rule, as implied by petitioner, that under facts similar to those involved here, the *Noerr-Pennington* doctrine would not be applicable.

Moreover, in the cited Fourth Circuit decision, the court stated that good faith participation in planning activities aimed at avoiding the needless duplication of health care resources may be, under those circumstances, immune from antitrust liability. *Hospital Bldg. Co. v. Trustees of Rex Hospital*, 691 F.2d 678, 686 (4th Cir. 1982). The court did rule, however, that intentional misrepresentations to government officials and other acts taken in bad faith in connection with petitioning the health care planning agency may fall within the sham exception to *Noerr-Pennington*. *Id.* at 688. However, neither lower court here has found such bad faith activities in this case.

In summary, the Ninth Circuit fully considered the activities engaged in by respondents and found them to be squarely within a correctly applied *Noerr-Pennington* doctrine. There is no conflict between the Ninth Circuit decision and any other circuit and, thus, no further review of the Ninth Circuit's opinion is necessary or desirable.

III. THE NINTH CIRCUIT'S OPINION, AS A MEMORANDUM DECISION, HAS NO PRECEDENTIAL VALUE AND IS INAPPROPRIATE FOR REVIEW BY THIS COURT.

The Ninth Circuit's opinion in this matter is a memorandum decision, which, according to the Ninth Circuit's own rules, will not be published. [Rules of the United States Court of Appeals for the Ninth Circuit, Rule 21]⁸ Rule 21 further provides that an opinion which is not for publication "shall not be regarded as precedent and shall not be cited to or by this court or any district court of the Ninth Circuit. . . ." [Rule 21(c)] Given such a rule, the Ninth Circuit did not consider its opinion in this matter to establish, alter or modify

⁸ Rule 21 is reprinted in Opp. App. D at D-1.

any rule of law. [Rule 21(b)(1)] Therefore, absent precedential value, it is self-evident that the unpublished decision in this case cannot be in conflict with the developing law in the remaining courts of appeals. It hardly seems appropriate for such an opinion to be considered for review by this Court.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

May 19, 1983.

Respectfully submitted,

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STATUTORY AND REGULATORY APPENDIX

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UNITED STATES CODE — Title 42

§ 300k-2(a)(2), (5). *National health priorities; strengthening competition in supply of services*

(a) The Congress finds that the following deserve priority consideration in the formulation of national health planning goals and in the development and operation of Federal, State, and area health planning and resources development programs:

(2) The development of multi-institutional systems for coordination or consolidation of institutional health services (including obstetric, pediatric, emergency medical, intensive and coronary care, and radiation therapy services).

(5) The development of multi-institutional arrangements for the sharing of support services necessary to all health service institutions.

ARIZONA REVISED STATUTES — Title 36 (1979 Version)

§ 36-433. *Application for certificate of need; approval by department of health services.*

A. No person required to obtain a certificate of need shall offer to the public or develop any new or substantially modified services or facilities of a health care institution without first obtaining a certificate of need therefor from the department of health services. Certificate of need shall be required under the following circumstances:

1. For capital expenditures which are in excess of three percent of the institution's budgeted annual expenses or capital expenditures over one hundred thousand dollars, whichever is less; or

2. Increases in bed capacity; or

3. New medical services, as defined in § 36-401; or

4. Substantial changes in medical services if they will result in increased expenditures of fifty thousand dollars or more within twelve months of the date of change in service. For purposes of this section capital expenditure means acquisition, by lease or

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purchase of a capital asset in the nature of buildings, fixtures or durable equipment.

B. An application for a certificate of need shall be filed with the authorized local agency in the area where the institution is located and with the department of health services prior to undertaking any substantial expenditures in preparation for such offering or development. In the case of construction projects, the department of health services may by regulations define requirements for filing a letter of intent prior to the application in such detail as may be to provide information about the scope and nature of the project at the earliest possible opportunity in the course of planning the project.

C. The department of health services shall issue regulations defining the form and content of the application and any supporting information to be required. Such regulations shall cover at least the following information to be included in the application pertaining to the proposed services or facilities:

1. The description, nature and purpose, including method of proposed construction in the case of facilities.
2. What health problems or needs will be satisfied by the proposed services or facilities or on what other basis the proposed services or facilities will be needed.
3. What geographical areas and population groups will be served by the proposed services or facilities.
4. The estimated cost and method of financing.
5. What effect the cost and financing will have on the costs, rates and charges of the applicant, on other costs to be borne by the public.
6. The ability of the applicant to comply with all applicable federal, state and local laws, ordinances and regulations.
7. The ability of the applicant to comply with all applicable professional and institutional standards.
8. The qualifications and ability of the applicant to provide and obtain proper financing, staffing, equipping, management and operation of the proposed services or facilities.

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9. A certificate stating that the applicant has reviewed, or attempted to review, the proposed construction or modification with other health care institutions in the area to be served for the purpose of exploring the feasibility of coordinating with such institutions' programs, services or facilities in accordance with the guidelines specified in § 36-133.01, subsection B, paragraphs 1 through 8. In cases where coordination among institutions is planned, a statement concerning the implementation of such coordination shall be included, which shall incorporate as guidelines the subjects of required findings specified in § 36-433.01, subsection 8, paragraphs 1 through 8 and this subsection.

10. Proof that the application conforms to health plans adopted by the authorized local agency.

D. No certificate of need shall be required for services, facilities, or construction of such services, facilities or construction are deemed necessary by the director for a presently licensed health care institution to maintain its license.

E. A certificate of need shall not be required for any project, including construction of an institution which provides only supervisory care services.

§ 36-433.01. *Review of certificate of need application; public hearing; written findings and recommendations; conflict of interests.*

A. The authorized local agency shall notify the applicant in writing of the beginning of the review. The director shall issue regulations defining the procedures for the review of the application which shall include the following provisions:

1. That no review shall take longer than one hundred forty-five days from the initial date of filing the application with the authorized local agency, unless the agency and the applicant agree in writing to an extension of time.

2. That a public hearing shall be initiated within thirty days after the filing of the application and shall be concluded within thirty days after initial session.

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3. That written notice of the hearing shall be delivered to the applicant at least ten days prior to the hearing date.

4. That the applicant shall be afforded opportunity at the hearing to present oral and written information on the application and to confront and question any persons appearing in opposition to the application.

5. That a written record shall be maintained of all public hearings under this subsection.

6. That corporate applicants may be represented at any stage of the certificate of need process by any one or more of the following:

- (a) An officer.
- (b) An employee.
- (c) An attorney.

B. Not later than forty-five days after the completion of the public hearing required pursuant to subsection A, the authorized local agency shall adopt written findings on the application, file them with the director, and mail a copy to the applicant. Such findings shall specifically cover the factors mentioned in subsection C of § 36-433 and the following additional factors:

1. The relationship of the services or facilities reviewed to the long-range development plan, if any, of the applicant.

2. The need that the population served or to be served by the services or facilities proposed has for them.

3. The availability of alternative, less costly, or more effective methods of providing the services or facilities.

4. The relationship of the services or facilities reviewed to the existing health care system of the area in which they are to be provided.

5. The availability of resources, including health manpower, management personnel and funds for capital and operating needs, for the provision of the services or facilities and the availability of alternative uses of such resources for provision of other services or facilities.

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6. The special needs and circumstances of those entities which provide a substantial portion of their services or resources, or both, to individuals not residing in the areas in which the entities are located or in adjacent areas. Such entities may include medical and other health professions schools, multidisciplinary clinics, specialty centers, and similar entities.

7. The special needs and circumstances of health care services organizations.

8. The impact the proposed services or facilities will have on the quality of health care available to the public.

C. An application for a certificate of need for the construction or modification of a nursing care institution or a residential care institution shall not be deemed incomplete or denied solely because the plan adopted by the authorized local agency or by the director does not provide, at the time of application, for the construction or modification of additional nursing care beds or residential care beds within the area served by the authorized local agency or on a state-wide basis.

D. The provisions of title 38, chapter 3, article 8.¹ shall apply to all board members, officers, employees, agents and representatives of a health systems agency when they are carrying out the provisions of this section.

§ 36-433.02. *Review of authorized local agency recommendations and approval by director; periodic reports; publication of reports; public access to applications.*

A. The director shall adopt the findings of the authorized local agency on the application for certificate of need unless the applicant files, within thirty days after receipt of the authorized local agency's findings, with the director a written request for review of such findings, or the director finds that such findings are arbitrary, capricious or not supported by any substantial evidence in which

¹ Section 38-501 et seq.

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event the director may modify or substitute such findings. The findings issued by the director shall state the basis for his decision. A copy of the director's findings and decision shall be mailed to the applicant. Any application returned to the authorized local agency for further review shall be processed in the same manner as a new application.

B. Applicants shall submit periodic reports annually or at the completion of a construction or modification project to the director, in the manner and form defined in regulations to be issued by the director, respecting the development of services or facilities subject to review.

C. The director shall publish regular reports of the reviews being conducted, including a statement of the status of each such review, and of reviews completed, including a general statement of the findings and decisions made in the course of such reviews, since the publication of the last such report.

D. Members of the general public shall have access to all applications reviewed under this section and to all other written materials pertinent to any reviews by the authorized local agency or the director. Added Laws 1975, Ch. 129, § 3, eff. June 11, 1975.

§ 36-433.03. *Further review by authorized local agency.*

If the director refers an application for certificate of need back to the local agency for further review, pursuant to § 36-433.02, subsection A, the local agency shall limit review of the application in accordance with the director's findings and instructions.

ARIZONA OFFICIAL COMPILATION OF RULES AND REGULATIONS — Chapter 9 (1979 Version)

R9-9-29. *Certificate of need application.*

A. Complete applications for a certificate of need shall be filed concurrently with the agency in the area where the institution is or is to be located and with the Department prior to undertaking any substantial expenditures in preparation for an offer to the public or development of services or facilities at a health care institution requiring a certificate of need.

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B. The applicant for a certificate of need shall complete forms supplied by the Department and currently file fifteen copies with the agency and three copies with the Department. The agency shall inspect the application promptly after it is received. Within fifteen days from date of receipt of the application by both the agency and the Department, the agency shall notify the applicant in writing, with a copy to the Department, as to the completeness of the application. In the event notice is given that an application is deemed incomplete, the applicant will be advised in writing by the agency of all specific deficiencies in the application.

C. The notice procedure specified in subsection B shall be followed for each supplementary filing of additional or revised information. The application or supplementary filing will not be deemed complete until the applicant is so notified in writing by the agency. In the event the applicant and the agency are unable to agree upon the completeness of an application or supplementary filing; such condition shall constitute a finding of the agency. The applicant may request a review by the Director of such finding, within 90 days after notice thereof. Procedures for a review by the Director are specified in R9-1-111, et seq. If no appeal is requested, the agency's finding shall be final as to that application.

D. After a determination of completeness pursuant to this regulation, the applicant shall not be required to supply additional supporting information without its consent, unless the agency makes a written request for additional information citing the section of this article which requires such information and further explaining the agency's need for the same.

R9-9-30. *Contents of the application.*

The application for a certificate of need shall consist of a program narrative and a project resource report.

1. The program narrative shall include:

a. A brief summary describing the nature and purpose of the proposed services or facilities, together with the proposed method of construction, if applicable. No plans or specifications shall be required to be filed with an applicant's certificate of need application; however, if re-

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quested by the agency, the design concept, including a description of the function and capacity of the proposed services or facilities by major departments shall be provided.

b. The health problems or needs which will be satisfied by the proposed services or facilities, or on what other basis the proposed services or facilities will be needed.

c. The geographical areas and population groups to be served by the proposed services or facilities, including designation of the planned location of the proposed services or facilities.

d. Availability of alternative, less costly or more effective means of providing these services or facilities.

e. A description of any new, expanded or reduced services which will result. This description shall include the following information, if applicable:

(1) Number of beds applied for, broken down by service or major division of the institution, e.g., medical/surgical, obstetric, pediatric, psychiatric, intensive care, etc.

(2) The number and identification of ancillary service rooms.

(3) Contemplated outpatient, social service, home care and preventive medical programs.

f. A certificate stating that the applicant has reviewed, or attempted to review, the proposed construction or modification with other health care institutions in the area to be served for the purpose of exploring the feasibility of coordinating with such institutions' programs, services or facilities in accordance with the guidelines specified in A.R.S. § 36-433.01, Subsection B, Paragraphs 1 through 8. In cases where coordination among institutions is planned, a statement concerning the implementation of such coordination shall be included, which shall incorporate as guidelines the subjects of required findings specified in the above referenced statute.

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2. The project resource report shall include statements pertaining to each of the following:

a. Estimated costs or savings, including, if applicable, preliminary estimate of construction costs.

b. Proposed or alternative methods of financing, including the availability and timing of financial resources with which the applicant proposed to complete the project.

c. Estimated operating expenses for each of the first three years of operation.

d. Estimated effect of the total cost or savings of the proposed project on the rates and charges of the applicant.

e. Estimated operating income for each of the first three years of operation.

f. Listing of current, if any, and/or planned personnel and medical staff by function and education or training.

g. In the case of projects primarily involving the acquisition of equipment, a complete list and description of each item of equipment involved having an acquisition cost of \$10,000 or more. In the case of all other types of projects, a list of the categories of the equipment involved and the estimated total cost of each category.

h. Ability of the applicant to comply with any applicable Federal, State and local laws, ordinances and regulations, including ability to obtain all required approvals and consents.

i. Ability to comply with all applicable professional and institutional or accreditation beyond the minimum State licensing requirements standards.

j. Qualifications and ability of the applicant to provide or obtain:

- (1) adequate financing
- (2) adequate and qualified staffing
- (3) necessary and appropriate equipment

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(4) qualified management for the proposed services or facilities.

k. Description of applicant's long-range development plan, if any, and of the relationship of the proposed services or facilities to the long-range plan.

l. Impact the proposed services or facilities will have on the quality of health care available to the public.

m. For proposals in which capital expenditures are anticipated, a copy of the applicant's latest annual expense budget.

3. The agency or the Department may limit the scope and detail required to be submitted in an application to facilitate review and issuance of findings on the application when such modification is deemed reasonably appropriate under the circumstances.

R9-9-31. Review and public hearing.

A. The review of the application shall conform with the provisions of Article 1 of this chapter. When an extension of time for hearing is agreed upon as provided in R9-9-17.C the extension shall also extend by an equivalent period the time within which the Director must make his final decision.

B. The conflict of interest provisions of Title 38, Chapter 3, Article 8 of the Arizona Revised Statutes shall apply to all board members, officers, hearing officers, employees, agents and representatives of an agency when they are carrying out the provisions of articles 1 and 2 of this chapter.

C. Within the limitations of R9-9-33.F, the agency shall recommend to the Director the period of time for which a certificate of need shall be valid for the purpose of applying for a permit under A.R.S. 36-421 or for a license under A.R.S. 36-421.01.

R9-9-32. Findings of agency.

A. Not later than fifteen days after the completion of the public hearing required pursuant to A.R.S. 36-433.01.A the agency shall adopt written findings on the application as provided in R9-9-20. The findings shall be based only on the information contained

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in the record of the public hearing and shall specifically cover at least the following factors:

1. The description, nature and purpose of the proposed services or facilities, including the proposed method of construction, if applicable.

2. The health problems or needs will be satisfied by the proposed services or facilities, or on what other basis the proposed services or facilities will be needed.

3. The geographical areas and population groups which will be served by the proposed services or facilities.

4. The estimated cost and method of financing, or the estimated savings and application of funds and the financial feasibility of the proposed services or facilities.

5. The effect the cost and financing will have on the costs, rates and charges of the applicant, or other costs to be borne by the public.

6. The ability of the applicant to comply with all applicable Federal, State, and local laws, regulations, ordinances and zoning requirements.

7. The ability of the applicant to comply with all applicable professional and institutional standards.

8. The qualifications and ability of the applicant to provide and obtain proper financing, staffing, equipment, management and operation of the proposed services or facilities.

9. The relationship of the services or facilities proposed to the applicant's long-range development plan, if any.

10. The need that the population to be served has for the services or facilities proposed.

11. The availability of alternative, less costly or more effective methods of providing some or all of the proposed services or facilities.

12. The relationship of the proposed services or facilities reviewed to the existing health care system of the area in which they are to be provided.

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13. The availability of adequate resources, including health manpower, management personnel, and funds for capital and operating needs, for the provision of the services or facilities and availability of alternative uses of such resources for provision of other services or facilities.

14. The special needs and circumstances of those entities which provide a substantial portion of their services or resources, or both, to individuals not residing in the areas in which the entities are located, or in adjacent areas. Such entities may include medical and other health professions schools, multidisciplinary clinics, specialty centers, and similar entities.

15. The special needs and circumstances of health care services organizations.

16. The impact the proposed services or facilities will have on the quality of health care available to the public.

17. The conformance of the proposed services or facilities with any health plans adopted by the agency.

B. Based upon the findings referred to in Subsection A. preceding, a further finding shall be made as to whether a certificate of need for the proposed services or facilities should be issued.

R9-9-33. *Review of agency findings.*

A. The Director will adopt the findings of the agency and issue a certificate of need on the application, unless:

1. The applicant files a written request for review within thirty days after receipt of the agency's findings, and the Director finds that the agency's findings are:

- a. arbitrary or capricious, or
- b. clearly erroneous, or
- c. incorrect as a matter of law, or
- d. the applicant did not receive a fair hearing, or

2. The Director finds, in the absence of any written request for review, that any of such findings are arbitrary, capricious or not supported by any substantial evidence.

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B. If an action described in Subsection A. above takes place, the Director may modify or substitute any findings or return the application to the agency.

C. Except as may be otherwise provided for in this regulation, all requests for review by the Director under this chapter shall be conducted in accordance with Rules of Practice and Procedure before the Department as specified in R9-1-111, et seq.

D. The findings issued by the Director shall state the basis for his decision. A copy of the Director's findings and decision shall be mailed to the applicant, the agency and the Department of Library, Archives and Public Records.

E. If the Director refers an application back to the agency for further review, such review shall be limited to the Director's findings and instructions.

F. A certificate of need shall be valid for only one year from date of issuance unless the Director grants an extension upon a showing by the applicant that a longer period is necessary due to circumstances beyond its control.

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REGULATORY DECISIONS

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BEFORE THE DIRECTOR OF THE ARIZONA DEPARTMENT OF HEALTH SERVICES

In the Matter of:)	No. CN 100-13
Review of Local Findings and)	CN 100-14
Recommendations on)	CN 100-17
Applications)	CN 100-21
for Certificates of Need by)	CN 100-23
)	CN 100-24
SUN CITY COMMUNITY)	CN 100-25
HOSPITAL, INC., VALLEY)	CN 100-26
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CORPORATION OF)	
AMERICA; PHOENIX)	FINDINGS AND DECISION
BAPTIST HOSPITAL; JOHN)	
C. LINCOLN HOSPITAL;)	
JOHN C. LINCOLN)	
HOSPITAL AND)	
SAMARITAN HEALTH)	
SERVICE; SCOTTSDALE)	
MEMORIAL HOSPITAL;)	
ABC-HMO, INC.; ST)	
JOSEPH's HOSPITAL AND)	
MEDICAL CENTER)	
)	

PURSUANT to the authority granted to me under A.R.S. §§ 36-433, 36-433.02 through 36-433.03, and in accordance with requests from hospital applicants herein for review of the findings made on June 22-23, 1979, by the Central Arizona Health Systems Agency (CAHSA) with respect to eleven applications to establish new general acute care hospitals, add new hospital beds and re-classify existing skilled nursing care beds as hospital beds; and

IN CONSIDERATION OF the record prepared by CAHSA consisting of eleven applications for certificates of need, Volumes I through IV entitled "List of Documents, Hospital Bed Allocation Committee" containing Exhibits 1 through 106, written transcripts of public hearings and Board meetings held by CAHSA, legal mem-

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oranda submitted by counsel for participants in the Department's review proceedings and tape recordings of the review proceedings held January 24, 1980; and

FURTHER, IN CONSIDERATION OF the Proposed Findings of Fact, Conclusions of Law and Recommendation dated March 25, 1980, from Charles D. Roush, Hearing Officer, previously appointed in this matter pursuant to A.R.S. §§ 36-112.C and 41-1011;

NOW, THEREFORE, I hereby make the following findings and decision:

FINDINGS APPLICABLE TO ALL APPLICATIONS

1. *The 1978-1984 CAHSA Hospital Bed Plan.* CAHSA is an authorized local agency recognized by the Department pursuant to A.R.S. § 36-401.3. CAHSA's 1978-1984 Hospital Bed Plan effective February 1, 1979 is the applicable health plan (the Plan) for purposes of A.R.S. § 36-433.C.10.

The Plan determined a need for an additional 369 general acute care hospital beds throughout CAHSA's health service area. For the purpose of performing planning functions, CAHSA has divided this health service area into segments called Health Analysis Regions (HARs). Each HAR is composed of several census districts and is used to identify and measure population demographics and population needs for health care facilities and services. The HAR is neither designed nor intended to be used as a health care institution service area.

All applications considered by CAHSA and subsequently reviewed in light of the Plan involve HARs I, II, III, IV, V and VIII; however, a separate set of findings and decisions applicable to HAR VIII has been previously issued. The 120 beds determined by the Plan to be needed in HAR VIII and the four applications for those beds, therefore, are ~~not~~ germane to this decision. For new hospital bed planning purposes, the Plan identified the following need for the remaining 249 beds:

<u>HAR I</u>	<u>HAR II</u>	<u>HAR III</u>
118 beds	98 beds	33 beds

Although no need was shown for additional beds in HARs

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IV or V, an applicant from each of these regions applied for a certificate of need to add beds to existing facilities. Evidently, they hoped to borrow from need shown in adjacent areas.

The Plan specifies on page 5 that:

“Health Analysis Regions are not hospital service areas; applicants may seek to combine beds shown as needed in contiguous Health Analysis Regions.”

In general, the HARs are irregularly shaped geographic areas. Among those regions for which the Plan reflects a need for additional general hospital beds, the following observations must be made. HAR I comprises part of greater west Phoenix and extends to the west border of Maricopa County. HAR I is contiguous with HAR II but not with HAR III or VIII. HAR II comprises part of greater north Phoenix and is contiguous with HARs I and III but not VIII. HAR III comprises southeast Paradise Valley, Scottsdale, Fountain Hills and the northeast portion of Maricopa County. HAR III is contiguous with HAR II and VIII but not I. (The Plan, page 5 and Appendix C, page 27.)

2. *Hospital Applications and CAHSA Review.* In response to the Plan, all applications to establish, reclassify or add hospital beds in HARs I, II, III, IV and V were filed within 40 days of the date the Plan became effective. Volume I, Text of Documents, Hospital Bed Allocation Committee, Exhibit 22. (Hereafter Ex. ____.)

To facilitate the application review process, CAHSA appointed one subcommittee to consider the applications filed for new beds in HAR I, and one subcommittee to consider applications filed in HARs II and III (Exs. 38, 56, 59 and 60). Public hearings required by A.R.S. § 36-433.01.A.2 were held by these committees during March, 1979 on all applications (Exs. 38, 39 and 48).

3. *Alteration of the Plan.* On June 21 through 23, 1979, the CAHSA Board of Directors (the Board) met to examine the reports of the subcommittees and determine whether any of the applications should be recommended for approval (Ex. 99). On the final day of its three-day public meeting, the Board adopted a motion to combine the bed need for HARs I, II and III. (Ex. 99, page 26,

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paragraph 24.) This alteration was not consistent with the portion of the Plan quoted in Finding I above and as previously interpreted by CAHSA staff.¹

4. *Alteration of the Plan Was Not Retroactive.* The Board's decision altering the Plan to permit grouping of bed need in HARs I, II and III was then applied to the applications under consideration. Although numerous motions were voted upon, adopted and reconsidered, in essence the Board voted to recommend approval of the application for a new 150-bed Lincoln Samaritan Hospital by using 88 beds from the Plan and 62 beds from existing Glendale Samaritan Hospital. (Ex. 99, page 28, paragraph 32; page 33, paragraph 47.) The Board also voted to recommend approval of John C. Lincoln Hospital's application to establish a new 120-bed hospital in HAR III by using 100 beds from the Plan and 20 beds from its existing hospital facility (Ex. 99, page 33, paragraph 46, Ex. 106, CAHSA findings for John C. Lincoln Hospital).

CAHSA is a health systems agency established in response to the National Health Planning and Resources Development Act of 1974, 42 U.S.C. § 300 k-1, *et seq.*, and is an authorized local agency recognized pursuant to A.R.S. § 36-401.3 for purposes of A.R.S. Title 36, Chapter 4, Health Care Institutions Act. Although a private non-profit corporation, in its exercise of the governmental activities contemplated by these Federal and State laws it is bound to observe substantially the same rules that a governmental agency must observe in the exercise of such activities. Among them is the fundamental principle that the agency must observe its own rules until such time as they are duly amended. *U.S. v. Nixon*, 418 U.S. 693, 694-96 (1974); *Gibbons v. Arizona Corporation Commission*, 95 Ariz. 343, 390 P.2d 582 (1964).

¹ During the morning meeting on June 23, 1979, before the Plan was altered, CAHSA Executive Director, Milton Gan, described the relationship between adjacent HARs with respect to bed need: "Mr. Gan noted that the ground rules were that the beds needed among the regions (HARs) were linked. The regions, he advised are not isolated, walled areas. The plan was that applicants could come in for beds for *Regions 1 and 2, or Regions 2 and 3.*" (Ex. 99, page 24, paragraph 19, emphasis added.)

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There is no doubt that substantial steps had been taken by CAHSA, applicants and others in reliance on the Plan. Within 40 days of Plan adoption, the applications subject to this review were filed (Ex. 22). Two separate CAHSA review committees were appointed with one assigned generally to applications in HAR I and another to applications generally in HARs II and III (Exs. 28, 56, 59 and 60). The 11 applications were reviewed by CAHSA at various dates in March, 1979 at public hearings (Exs. 38, 39 and 48). The CAHSA Board had begun its active consideration of the applications *before* altering its Plan. (Ex. 99, page 15-26.) These factors, and the legal principles which follow, preclude retroactive application of the Plan amendment to group bed need in HARs I, II and III.

The principle is well established that quasi-legislative pronouncements by an administrative agency should not operate retroactively except in unusual circumstances and only then when necessary to clarify confusing or unsettled law. *See* reasoning enunciated in *Anderson, Clayton & Co. v. United States*, 562 F.2d 972, 983-4 (5th Cir. 1977), *cert. denied*, 436 U.S. 944 (1978); *Essential Communication Systems, Inc. v. AT & T Co.*, 446 F. Supp. 1090, 1110 (D.N.J. 1978). Davis, *Administrative Law Treatise*, (2nd ed. 1979) § 7.23. Such is not here the case. A rule cannot be applied retroactively which creates, defines and regulates rights. *Allen v. Fisher*, 118 Ariz. 95 (Ct. App.), 574 P.2d 1314, 1315 (1978). I conclude that the Board's alteration of the Plan or its interpretation of the Plan resulted in arbitrary and capricious action by CAHSA and, therefore, the result of that alteration must be disapproved and new findings substituted.

The use of 88 beds from HAR II left 10 beds remaining for allocation either to HARs I or III. Since the bed need in HAR III was 33, the total need available in HAR III, consistent with the above-quoted statement in the Plan, was 43. There were 10 remaining unallocated beds needed in HAR II and none in the other region contiguous to HAR III. This was insufficient bed need to establish a new hospital meeting the minimum 120 bed size requirements of the Plan. See the Plan, page 5, paragraph 3. Therefore, only by borrowing bed need from HAR I could the Board recommend approval of a new hospital in HAR III. This it could not do.

5. *Fair Hearing Considerations: Quorum.* The CAHSA

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bylaws require a mere presence of a sufficient number of Board members to create a quorum. A sufficient number of Board members was present to create a quorum. Throughout the three sessions of the public meeting held on June 21 through 23, 1979, there was neither a challenge to the quorum nor an objection to the declaration of a quorum.

6. *Fair Hearing Considerations: Timeliness.* CAHSA exceeded the 145 day limitation stated in A.R.S. § 36-453.01.A.1. This procedural irregularity does not, however, entitle an applicant to specific relief. The relief available to an administrative officer is limited to the alternatives conferred by statute. *Kendall v. Malcolm*, 98 Ariz. 329, 404 P.2d 414 (1965). There is no statutory remedy provided for violation of the 145 day statute. Further, no single applicant received substantially different treatment since CAHSA's findings were submitted within a 16 day period of each other (Ex. 106). The decision to follow the comparative review principles of *Ashbacker Radio Corp. v. F.C.C.*, 326 U.S. 327, 66 Sup. Ct. 148 (1945), afforded all applicants equal consideration before the Director.

7. *Fair Hearing Considerations: Photographs and Newspaper Articles.* The consideration of certain photographs and newspaper articles by the Board may have been technically irregular. However, a review of all the material presented demonstrates that the consideration of the material was harmless. Further, the transcript does not contain any objection to the use of the photographs and newspaper articles. Therefore, the error, if any, was not preserved and was waived.

8. *Fair Hearing Considerations: No Cross-Examination.* A.R.S. § 36-433.01.A.4. contemplates some confrontation and cross-examination by an applicant of any person who opposes the applicant. However, the transcripts do not contain any objection by an affected applicant to its inability to cross-examine or confront a particular person. Therefore, the error, if any, was not preserved and was waived.

9. *Fair Hearing Considerations: "Last Minute Decision."* The Board was under substantial pressure to forward findings within the 145 day limit. The Board members were issued copies of the

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hearing transcripts before the Board met on June 21, 1979 (Exs. 94, 96 and 99, page 12, paragraph 1). Members were, thus, afforded an opportunity to review and consider the facts presented at all public hearings before a final vote was taken. Each applicant was given equal consideration as each Board member was able, before voting, to review the facts presented at the public hearings. CAHSA followed the comparative review principles of *Ashbacker*.

10. *Fair Hearing Considerations: Conclusion.* On review of the record of public hearings and all pertinent exhibits, CAHSA afforded all applicants a fair hearing as required by A.C.R.R. R9-9-33.A.1.d.

FINDINGS AND DECISION APPLICABLE TO SPECIFIC APPLICANTS

11. The findings made by CAHSA with respect to the applications listed below in this paragraph were not arbitrary, capricious, clearly erroneous and incorrect as a matter of law; further, the findings were supported by substantial evidence of record:

a) Application by Samaritan Health Service and John C. Lincoln Hospital to establish Lincoln Samaritan Hospital and Health Center, a 150 bed hospital at 55th Avenue and Thunderbird Road, Glendale, Arizona. The co-applicant, Samaritan Health Service, will transfer 62 hospital beds from the existing Glendale Samaritan Hospital which will be closed.

b) Application by Phoenix Baptist Hospital and Medical Center to add 102 beds to its existing facility at 19th Avenue and Bethany Home Road, Phoenix, Arizona.

c) Application by Scottsdale Memorial Hospital to add 33 beds to its existing facility at 74th Street and Osborn Road, Scottsdale, Arizona.

d) Application by Scottsdale Memorial Hospital to establish a 120 bed hospital at Pima Road and East Shea Boulevard, Scottsdale, Arizona.

e) Application by St. Joseph's Hospital and Medical Center to add 84 beds to its existing facility at 350 West Thomas Road, Phoenix, Arizona.

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f) Application by Hospital Corporation of America to establish a 120 bed hospital at Scottsdale and Bell Roads, Scottsdale, Arizona.

12. The findings made by CAHSA, which are public records available for inspection at the Director's office pursuant to the Public Records, Printing and Notices Act, A.R.S. Title 39, Chapter 1, with respect to the 6 applications listed in paragraph 11 above, are hereby incorporated in this decision and are ADOPTED.

13. The following applicant is hereby GRANTED a certificate of need: Samaritan Health Service and John C. Lincoln Hospital to establish Lincoln Samaritan Hospital and Health Center, a 150 bed hospital at 55th Avenue and Thunderbird Road, Glendale, Arizona. The co-applicant, Samaritan Health Service, will transfer 62 hospital beds from the existing Glendale Samaritan Hospital which will be closed.

14. The following applicants are hereby DENIED a certificate of need:

a) Phoenix Baptist Hospital and Medical Center to add 102 beds to its existing facility at 19th Avenue and Bethany Home Road, Phoenix, Arizona.

b) Scottsdale Memorial Hospital to add 33 beds to its existing facility at 74th Street and Osborn Road, Scottsdale, Arizona.

c) Scottsdale Memorial Hospital to establish a 120 bed hospital at Pima Road and East Shea Boulevard, Scottsdale, Arizona.

d) St. Joseph's Hospital and Medical Center to add 84 beds to its existing facility at 350 West Thomas Road, Phoenix, Arizona.

e) Hospital Corporation of America to establish a 120 bed hospital at Scottsdale and Bell Roads, Scottsdale, Arizona.

15. Findings 1-3, 5, and 8-17 made by CAHSA dated July 2, 1979, on the application of John C. Lincoln Hospital to construct and operate Paradise Valley Community Hospital, a 120 bed general acute care hospital at 42nd Street and Cactus Road, Phoenix, Ari-

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zona, which are public records available for inspection at the Director's office pursuant to the Public Records, Printing and Notices Act, A.R.S. Title 39, Chapter 1, were not arbitrary, capricious, clearly erroneous or incorrect as a matter of law; further they were supported by substantial evidence and are hereby incorporated in this decision and are ADOPTED.

16. Findings 4, 6, 7 and 18, made by CAHSA dated July 2, 1979, on the application by John C. Lincoln Hospital to construct and operate Paradise Valley Community Hospital, a 120 bed general acute care hospital at 42nd Street and Cactus Road, Phoenix, Arizona, were arbitrary and capricious and, for the reasons stated in paragraphs 3 and 4 above, are DISAPPROVED. Findings 4 and 6 are substituted and Finding 7 is modified as follows:

FINDING 4. THE NEED THAT THE POPULATION SERVED OR TO BE SERVED, HAS FOR THE SERVICES OR FACILITIES PROPOSED.

The 1978-1984 Hospital Bed Plan (the Plan) adopted by the Board of Directors of the Central Arizona Health System Agency (CAHSA) in effect at the time of filing this application, authorizes the addition of 33 general acute care hospital beds to serve the population of HAR III. The Plan permits the additional consideration of 98 beds needed in HAR II and 120 beds needed in HAR VIII for a total bed need in HARs II and III of 251 beds. However, at the time the Board considered this application, it also recommended approval of the application submitted by Samaritan Health Service and John C. Lincoln Hospital (HF78-64; CN 100-26) in HAR II. Earlier, the Board had concluded its findings and had approved the application of Lutheran Hospitals and Homes Society of America (CN 100-29) in HAR VIII. Therefore, by simultaneous or prior Board action, the total bed need available for allocation in HARs II and III was 43.

FINDING 6. CONFORMANCE OF THE PROPOSED SERVICES OR FACILITIES WITH ANY COMPREHENSIVE HEALTH PLAN OR HEALTH SYSTEMS PLAN THAT MAY HAVE BEEN ADOPTED BY THE AGENCY.

This application was considered in conjunction with the other applications which proposed to serve the needs of the pop-

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ulation in HARs II and III. The Board followed the principles of comparative review so that a recommendation approving the establishment of a new hospital which conformed with the minimum size new hospital stated in the Plan to meet the need in HARs II and III, effectively precluded a recommendation to approve the establishment of another new hospital to serve HARs II and III. See the Plan, Appendix C, page 27, paragraph 5. Therefore, for the reasons stated in Finding 4 above, the simultaneous recommendation for approval of application HF78-64; CN 100-26 and prior recommendation for approval of CN 100-29, prevented the Board from approving this application because the total bed need available for allocation in HARs II and III was 43.

FINDING 7. THE AVAILABILITY OF ALTERNATIVE, LESS COSTLY, OR MORE EFFECTIVE METHODS OF PROVIDING THE SERVICES OR FACILITIES.

The applicant reviewed and evaluated the following alternative approaches to meet the increasing need for health care services in the northern portion of metropolitan Phoenix and Maricopa County.

- 1) Continue to expand the bed complement at John C. Lincoln Hospital at its existing location to accommodate the inpatient requirements of the residents of Paradise Valley, and develop more extensive services on the site owned by John C. Lincoln Hospital in Paradise Valley without including any inpatient beds.

- 2) Develop an inpatient acute care hospital in Paradise Valley which would be sponsored by John C. Lincoln Hospital and which would share as well as centralize certain functions at the existing facility, and transfer existing beds from John C. Lincoln Hospital to serve the Paradise Valley community.

In reviewing these alternatives, the applicant considered the following issues:

- 1) The existing physical plant of John C. Lincoln Hospital is geared to a capacity of 282 beds.

- 2) The existing capacities of John C. Lincoln Hospital in terms of ancillary and general support services is limited to a maximum of 282 beds.

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3) John C. Lincoln Hospital is limited in terms of expansion capabilities at its existing site.

4) The intent of the 1978-1984 Hospital Bed Plan is to provide local accessible health care services to the residents of rapidly growing suburban areas.

Based upon the applicant's evaluation of the available alternatives, it was the applicant's conclusion that the most effective and advantageous approach to meet the health care needs of the Paradise Valley population would be through the development of the Paradise Valley Community Hospital.

17. The following applicant is hereby DENIED a certificate of need: John C. Lincoln Hospital to construct and operate Paradise Valley Community Hospital, a 120-bed general acute care hospital at 42nd Street and Cactus Road, Phoenix, Arizona.

18. For the reason that neither the record nor the CAHSA findings provide sufficient information to resolve competing applications for beds to serve the population in HAR I, all decisions concerning those applications are hereby held in abeyance pending the return of certain questions certified to CAHSA.

19. These findings and decisions have been achieved after much deliberation concerning my function and authority when reviewing local findings and recommendations. I am mindful that the linchpin of these decisions is paragraph number four. That finding has been formulated with the belief that under prevailing law, the authority to determine and interpret the applicable health plan is reposed exclusively in the authorized local agency for the health service area concerned, in this case CAHSA. I am also of the belief that those of us who exercise government powers must do so without changing the rules of the game when faced with difficult decisions. Accordingly, I disclaim that these findings in any way preempt the authority of CAHSA to determine the local need by regionalizing its service area for purposes of its analysis and to regroup the entire area or any portion of it when comparing the merits of numerous applications. I do claim, however, that whatever formula, procedures or rules it may have promulgated to assist in its endeavor must be adhered [sic] to throughout its considerations.

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However well intended, the decision of the CAHSA Board to alter the manner in which it reassigned bed need among its regions is a fundamental departure from the rules it had had in effect and the portions of its findings which depended upon such reassignment cannot be supported.

PURSUANT TO A.R.S. § 41-1010.B and A.C.R.R. R9-1-125, any applicant or CAHSA who is aggrieved by this decision is afforded ten (10) days from receipt of this decision to request that the findings be amended, or that the matters be reconsidered, or that the decision be altered or reversed. Such request shall be submitted in the form and manner permitted by A.C.R.R. R9-1-125.

DATED this 24th day of April, 1980.

SUZANNE DANDROY, M.D., M.P.H.
Director

BEFORE THE DIRECTOR OF THE ARIZONA DEPARTMENT OF HEALTH SERVICES

In the Matter of)	
Review of Local Findings and)	
Recommendation on)	
Application for Certificate of)	
Need by:)	CN100-35
)	
PHOENIX BAPTIST)	FINDINGS AND DECISION
HOSPITAL AND MEDICAL)	
CENTER, INC. to add 91 beds)	
to its hospital facility)	
)	

Pursuant to the authority granted to me by A.R.S. §§ 36-112.A, 36-433 and 36-433.02, and in accordance with notices of appeal from Samaritan Health Service (SHS), John C. Lincoln Hospital (Lincoln) and Lincoln Samaritan Hospital and Health Center (Lincoln Samaritan) for review of the findings and recommendation filed with the Director on October 30, 1980, by the hearing body for the State Health Planning Advisory Council (SHPAC) regarding

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an application from Phoenix Baptist Hospital and Medical Center, Inc. (Phoenix Baptist), for a certificate of need (CON) to add 91 beds and expand ancillary services at the Phoenix Baptist Hospital facility; and

IN CONSIDERATION of the record of this proceeding, all memoranda filed with the Director by Phoenix Baptist, SHS, Lincoln and Lincoln Samaritan, the proposed findings and decision by David G. Eisenstein, Esq., appointed Hearing Officer and the comments or objections filed by Phoenix Baptist¹, SHS² and Lincoln Samaritan³ in response to the hearing officer's proposed findings and decision;

NOW, THEREFORE, I hereby make the following findings and decision:

FINDINGS

1. I hereby incorporate by reference, approve and adopt the following findings made by the Hearing Officer contained in the Proposed Findings and Decision by Appointed Hearing Officer dated March 13, 1981 (Hearing Officer's Report):

Hearing Officer Findings 1 (less the phrase "in all material respects" at page 1, line 28), 2 through 8 and 10 through 12, inclusive.

The Hearing Officer's Report is available for examination and photocopying at the Office of the Director, Room 407, 1740 West Adams, Phoenix, Arizona.

2. The appellants contended that before the hearing body findings and recommendation were filed with the Director, they should have been reviewed by the SHPAC. This contention is without merit.

¹ Objections and Comments dated April 1, 1981 and letter from J. Barry Johnson dated April 1, 1981.

² Comments dated April 1, 1981, by Noreen Sharp for George H. Mitchell.

³ Comments dated March 31, 1981, by Jerry L. Angle.

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The Department rules⁴ distinguished between other authorized local agencies and SHPAC and the procedures to be followed. Under A.C.R.R. R9-9-40.E, SHPAC was not permitted to review the hearing body findings and recommendations. However, under A.C.R.R. R9-9-33, the governing body of any other authorized local agency was required to review the findings of the hearing body.

The variation between the SHPAC procedures and the procedures required for other authorized local agencies arose from practical and geographical considerations. Pursuant to A.R.S. § 36-126.A, the membership of SHPAC must "reflect the geographic and socio-economic distribution of the state population. . . ." Accordingly, the membership of SHPAC must come from throughout the state. Also, pursuant to A.R.S. § 36-127, SHPAC has extensive responsibilities in addition to the review of applications for CONs in the field of health planning, establishment of the state health plan and consideration of construction and modernization of health care institutions.

For these reasons, SHPAC was relieved by rule of the responsibility of reviewing, as a complete body, the findings from each application for a CON submitted either by a state agency or by another institution in an area where no authorized local agency was available to serve.

In the absence of SHPAC review, A.C.R.R. R9-9-40.C.3 provided an alternate process by requiring that the public hearing body chairman be a member of SHPAC and a sufficient number of SHPAC members be on each hearing panel. In contrast, the rules applicable to public hearings by other authorized local agencies under A.R.S. § 36-433.01.A.3, did not require that members of the authorized local agency governing body be appointed to the hearing body. A.C.R.R. R9-9-31 and -32.

3. I hereby modify Hearing Officer Finding 9 by adding

⁴ Citations to rules and regulations throughout the findings refer to the rules adopted by emergency on August 14, 1980 and November 24, 1980.

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the following at page 6, after line 1. Hearing Officer Finding 9 as modified below is approved and adopted:

Mm. Reply Memorandum of Applicant in Support of Motion to Strike Appeal by Lincoln Samaritan.

Mn. Letter dated February 10, 1981 from William Alsentzer to John H. Daniels.

4. I hereby make the following technical correction to the Hearing Officer's Report:

References throughout the Hearing Officer's Findings characterizing the application as a \$24 million project are changed to a \$25,568,186 project. This is the amount including financing charge found by the hearing body to represent the total adjusted project cost.

5. The findings numbers 1, 3, 4 and 9 filed with the Director on October 30, 1980, by the hearing body selected by the SHPAC on this application were not arbitrary, capricious, clearly erroneous or incorrect as a matter of law; further, these findings were supported by the weight of the evidence and by this reference are incorporated, approved and adopted.

6. Hearing Officer Finding 13 beginning at page 6, line 13 of the Hearing Officer's Report, modified or substituted 12 findings (including subparts of finding 1) made by the SHPAC hearing body. I hereby find that SHPAC hearing body findings numbers 1.A, 1.B, 1.C, 1.D, 2, 5 through 8 and 10 through 15, inclusive, were not supported by the weight of the evidence and are hereby disapproved.

7. I hereby incorporate by this reference, approve and adopt substituted or modified findings numbers 1(a), 1(b), 1(c), 5, 6, 14 and 15 made by the Hearing Officer to replace corresponding hearing body findings.

8. I hereby modify substituted finding number 1(d) made by the Hearing Officer in place of hearing body finding 1.D. As modified below, I adopt the following finding:

FINDING 1.D

The applicant has submitted its rates and charges for the current year and stated that those rates and charges will only be

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adjusted for inflation. Among the various additional costs which the applicant would face from this project are the construction costs of shelled-in space. The applicant testified at the public hearing that only its "bottom line" (net income) will be affected by the increased costs resulting from this application. The applicant testified that patients at its hospital will not face higher rates solely as a result of the planned additions. The weight of the evidence does not support the applicant's attempt to establish the cost efficiency of its proposed additions. Based on the projected revenue figures presented by the applicant, without additional income there is a likelihood that the applicant will increase its rates and charges to accommodate its increased operating costs incurred by this project.

Reason for Modified Finding 1.D

This modification conforms with the evidence of current underutilization of hospital beds at other facilities in the applicant's proposed service area. The likelihood that the applicant may increase rates and charges (in excess of the rate of inflation) is a logical inference supported by the weight of the evidence. See also reasons for modified finding 11.

9. I hereby modify substituted finding number 2 made by the Hearing Officer in place of hearing body finding number 2. As modified below, I adopt the following finding:

FINDING 2

The applicant bases the need for new services on the growth of population in Health Analysis Regions (HARs) 1 through 5 and on the growth of the medical staff of the applicant's hospital. A serious consideration of the availability of other hospital beds in the service area was not made a part of this CON application. The applicant has attempted to justify the requested beds and ancillary services based on the historical growth and utilization it has experienced rather than on the basis of an area-wide planning perspective which takes into account the occupancy rates and other utilization information of the other providers in the general area of Phoenix Baptist. The applicant has recently experienced an occupancy rate over 80% and has found that the demand for its medical-surgical beds is increasing. It has not, however, been able to overcome the

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evidence of the increased availability of beds in the area submitted by the appellants. The applicant has projected that the hospital beds requested in its application will not be available for use until 1984, which is the same year Lincoln-Samaritan Hospital plans to make use of the beds awarded to it by virtue of its CON obtained before this application was set for public hearing. The Lincoln Samaritan Hospital will introduce an additional 83 beds to the population in greater northwest Phoenix.

The relatively low occupancy rates of Maryvale Samaritan, Valley View, Boswell, Lincoln and St. Joseph's demonstrate that the anticipated crowded conditions at Phoenix Baptist are not shared on an area-wide basis. All of the hospitals previously mentioned are within a relatively short driving distance from Phoenix Baptist. In non-emergency cases, the impact of increased driving distance is minimal.

The factors listed in this finding are not intended to imply that the preference of the physicians or their patients in their choice of hospital can or should be ignored. However, since existing institutions are having difficulty obtaining optimal occupancy and these institutions are relatively close in proximity to the applicant, it is unreasonable further to increase this utilization disparity by adding additional hospital beds in this area.

Reason for Modified Finding 2

This modification conforms with the evidence by deleting reference to the problems of admission privileges between allopathic and osteopathic physicians.

10. I hereby modify substituted finding 7 made by the Hearing Officer in place of hearing body finding 7. As modified, I adopt the following finding:

FINDING 7

It would be more cost efficient, appropriate and rational to utilize the existing unused hospital beds in the community and those to be built by 1984 than to authorize the \$25,568,186 project requested by the applicant. The Lincoln Samaritan facility to be constructed by the end of 1984, Boswell Memorial, Valley View, John

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C. Lincoln, Maryvale Samaritan and St. Joseph's all appear to be capable of accommodating patients who require hospital services in the service area proposed by Phoenix Baptist. The population to the far northwest should provide a reasonable patient base for Lincoln Samaritan. The area within a few miles of Phoenix Baptist is a more mature populated area than that which will form the primary service area of Lincoln Samaritan and the evidence in the record demonstrates that maturity will become more and more pronounced as time goes on.

The record reflects that Maryvale Samaritan is in the process of completing its efforts to induce private physicians to locate nearby to its facility and it is similarly clear that Lincoln Samaritan will undertake to attract physicians to do likewise with respect to its facility. It is logical that these hospitals will attempt to persuade physicians to admit patients primarily to the hospital nearest to the physicians' offices.

Reason for Modified Finding 7

This modification conforms with the evidence regarding osteopathic hospital admission practices and the logical impact in the future of physicians locating their offices near other hospitals.

11. I hereby modify substituted finding 8 made by the Hearing Officer in place of hearing body finding 8. As modified, I adopt the following finding:

FINDING 8

The applicant has demonstrated an historical ability to provide and obtain proper financing, staffing, equipment, management and operation of the existing facility. One opponent noted from its experience that the applicant may encounter substantial difficulty in obtaining adequate numbers of qualified nursing personnel to staff the additions in this application. While there was little evidence concerning the market conditions for the bond mechanism proposed to be used by the applicant, it appears that, based on the applicant's past success in obtaining financing through the tax-exempt financing described in the application, the applicant is capable of securing similar financing for the additions contemplated.

There is no evidence that the applicant is incapable of operating a larger facility as contemplated. In fact, substantial evidence was produced concerning the successful operations by the applicant heretofore.

Reason for Modified Finding 8

This modification conforms with the testimony of one opponent regarding its difficulty in obtaining nurses to staff its hospital.

12. I hereby modify substituted finding 10 made by the Hearing Officer in place of hearing body finding 10. As modified, I adopt the following finding:

FINDING 10

The applicant demonstrated that it has an admirable policy of reaching out to non-urban communities such as Gila Bend and Black Canyon City where other facilities have either been unwilling or unable to do so.

Reason for Modified Finding 10

This finding was modified to delete reference to the effect on health care services organizations.

13. I hereby modify substituted finding 11 made by the Hearing Officer in place of hearing body finding 11. As modified, I adopt the following finding:

FINDING 11

The applicant has demonstrated through its prior bond issues that competition should not be a major factor in obtaining financing for the proposed project. However, in light of the area-wide low occupancy rate experienced by the other hospitals noted in Finding 2, the supply of hospital beds is adequate to meet the projected need in the applicant's proposed service area. In addition, the establishment of 88 additional hospital beds in 1984 by Lincoln Samaritan Hospital will further meet the needs of the population in the greater northwest Phoenix area.

As noted in Finding 3, one opponent commented upon the significant competition for qualified staff and the likelihood of dif-

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ficulty in securing nursing personnel required to staff the applicant's project.

Reason for Modified Finding 11

This modification conforms with the evidence regarding underutilization of hospital beds by other institutions in the applicant's service area and one opponent's difficulties in nurse staffing.

14. I hereby modify substituted finding 12 made by the Hearing Officer in place of hearing body finding 12. As modified, I adopt the following finding:

FINDING 12

One opponent noted that 1) the applicant's charge for a semi-private hospital room is the highest among 8 hospitals in the greater Phoenix area and 2) in the last 8 months, the applicant increased its charges approximately 35% (Tesisimony [sic] of C. Teng, Transcript, pp. 90-91). The proposed additions, including the expense of the shelled-in space, would add significantly to the applicant's operating costs. Interest expense alone is projected by the applicant to jump from just under \$1.5 million in 1981 to over \$4 million in each of the years 1984, 1985 and 1986. Other costs of operating a larger facility also will increase. If the applicant meets its projected occupancy rate through the year 1986, it stated that patient rates would be increased only to offset increases in inflation. As a result, the applicant's net income will be substantially decreased by maintaining its present rates increased only by the rate of inflation. As noted in Findings 2, 7 and 11 above, there is significant statistical underutilization among other area hospitals which make it unlikely that, in the relatively near future, the applicant could reach the occupancy rates projected. For all the above reasons, it is likely that the applicant may again increase its rates and charges in excess of increases for inflation.

Reason for Modified Finding 12

This modification draws a logical inference that the applicant may raise rates and charges to offset its increased operating costs generated by approval of this application. The evidence of existing available beds and new beds in 1984 at other hospitals, leads to the

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conclusion that the applicant may not succeed in satisfying its projected occupancy rates. As a result, it is likely that the applicant may not generate sufficient patient revenues to offset its increased operating expense. Therefore, it is logical that the applicant may raise its rates and charges in order to generate income sufficient to satisfy its increased operating costs.

15. I hereby modify substituted finding 13 made by the Hearing Officer in place of hereing [sic] body finding 13. As modified, I adopt the following finding:

FINDING 13

The 1978-1984 Hospital Bed Plan adopted by the Arizona Department of Health Services in A.C.R.R. R9-9-39.C.1 (the plan) and considered to be the local plan in effect for purposes of this application, identified a need for 369 additional acute care beds in HSA I. At the time of this public hearing on September 23, 1980, three hundred and forty of those beds had subsequently been allocated for construction, leaving 29 beds for allocation on September 23, 1980. The proposal of Phoenix Baptist Hospital is inconsistent with authorized bed levels of the plan in that the proposal requests more than three times the number of beds available for allocation.

The State Health Plan identifies a current state-wide surplus of hospital beds which "will be reduced to about 350 if no new beds are added to this resource pool before 1983." The addition of 91 beds would further contribute to the overall state bed surplus. The applicant has not demonstrated by a preponderance of the evidence the need for additional acute care beds to be located at its facility. Substantial evidence was presented at the public hearing that not only Lincoln Samaritan's but other beds would be coming on line in the northwest side of Greater Phoenix during or prior to 1984. Phoenix Baptist is located near the central core of Phoenix in HAR 4, which has more than enough hospital beds available to nearby residents. The existing relatively low occupancy rates experienced by other hospitals and the duplication and overlapping of services as stated in these findings, demonstrate there is no need for hospital beds in addition to those already authorized for the northwest side of metropolitan Phoenix. The needs of Phoenix Baptist as a single institution, while important to the consideration of its

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application for certificate of need, are not the controlling considerations on that issue. The needs of the community on an area-wide basis are foremost. It has not been demonstrated by a preponderance of the evidence that the proposals included in the application are needed by the community.

Reasons for Modified Finding 13

References to the 1984 bed plan adopted by the Board of Directors of the Central Arizona Health System Agency were modified to cite the plan adopted by rule applicable to HSA I.

Hospital bed availability under the plan adopted in A.C.R.R. R9-9-39.C.1, was determined based on the number of unallocated hospital beds effective September 23, 1980, the date of the public hearing. Certificates of need for hospital beds in HSA I issued after September 23, 1980, were not considered in making this finding.

16. The applicant, Phoenix Baptist, received a fair hearing.

DECISION

Phoenix Baptist Hospital and Medical Center, Inc., is hereby DENIED a certificate of need to add 91 hospital beds and expand ancillary services at its existing hospital facility located at 6025 North 20th Avenue, Phoenix, Arizona.

PURSUANT TO the requirements of A.R.S. § 41-1010.B and A.C.R.R. R9-1-125, the parties are advised that they have a period of ten (10) days from receipt of this Decision to request that the findings be amended, or that the matter be reconsidered, or that the decision be altered or reversed. Such request shall be submitted in the form and manner prescribed in A.C.R.R. R9-1-125.

DATED this 21st day of May, 1981.

ARIZONA DEPARTMENT OF HEALTH
SERVICES

JAMES E. SARN, M.D., M.P.H.
Director

Appendix C-1

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CA #81-5848

PHOENIX BAPTIST)	
HOSPITAL AND MEDICAL)	
CENTER, INC., an Arizona)	APPEAL FROM THE
corporation,)	UNITED STATES DISTRICT
)	COURT FOR THE DISTRICT
Plaintiff-Appellant,)	OF ARIZONA
)	
vs.)	
)	
SHS HOSPITAL)	
CORPORATION, an Arizona)	
corporation; JCL HOSPITAL)	
CORPORATION, an Arizona)	
corporation; LINCOLN)	
SAMARITAN HOSPITAL)	
AND HEALTH CENTER, a)	
joint venture of SHS)	
HOSPITAL CORPORATION)	
and JCL HOSPITAL)	
CORPORATION,)	
)	
Defendants-Appellees.)	
_____)	

STIPULATED MATERIALS SUPPLEMENTING ORAL
ARGUMENTS OF THE PARTIES

During oral argument of the above-matter, the Court requested the parties hereto to submit additional materials to the Court explaining the relationships between the defendants-appellees herein and the remaining defendants in this matter in the United States District Court for the District of Arizona (No. CIV. 81-798 PHX CLH). In response to that request, the following materials are submitted upon stipulation of the attorneys for the parties hereto.

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I.

Background

In its First Amended Complaint, dated July 31, 1981 [Excerpts of Clerk's Record, Doc. 5, at p. 5], plaintiff-appellant Phoenix Baptist Hospital and Medical Center, Inc. ("Phoenix Baptist") named the following parties as defendants:

Samaritan Health Service
SHS Hospital Corporation
Arizona Hospital Service Corporation
Health Enterprises, Inc.
Standard Surgical Supply Co.
Hospital Ambulance Service of Arizona, Inc.
John C. Lincoln Hospital
JCL Hospital Corporation
Lincoln Samaritan Hospital and Health Center

On September 15, 1981, upon stipulation of Phoenix Baptist and John C. Lincoln Hospital, Judge Walter E. Craig entered an order dismissing with prejudice Phoenix Baptist's claims against John C. Lincoln Hospital. On September 23, 1981, Judge Craig entered judgment dismissing with prejudice the First Amended Complaint as to, or in the alternative granting summary judgment in favor of, SHS Hospital Corporation, JCL Hospital Corporation and Lincoln Samaritan Hospital and Health Center (the "Health Center Defendants"), which judgment is the subject of the appeal before this Court.

By order dated March 25, 1982, District Judge Charles L. Hardy granted Phoenix Baptist's Motion to Amend its Complaint, and Phoenix Baptist filed its Second Amended Antitrust Complaint and Demand for Jury Trial, dated March 24, 1982, a copy of which is attached hereto as Exhibit "A." As a result of the above-described dismissals of claims against John C. Lincoln Hospital and the Health Center Defendants, the remaining defendants in the action before Judge Hardy in the District Court (No. CIV 81-798 PHX CLH) are the following:

Samaritan Health Service
Arizona Hospital Service Corporation
Health Enterprises, Inc.

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Standard Surgical Supply Co.
Hospital Ambulance Service of Arizona, Inc.

II.

Defendants Remaining in the District Court

The following more fully identifies the above-named defendants remaining in the District Court (No. CIV 81-798 PHX CLH) and their relationships to Samaritan Health Service:

<u>Name of Organization</u>	<u>Type of Organization and Parent or Controlling Entity</u>	<u>Primary Activities</u>
Samaritan Health Service	An Arizona non-profit corporation, the Board of Directors of which are selected by SamCor, Inc.*	Owens and/or manages seven Arizona hospitals.
Arizona Hospital Service Corporation	An Arizona (Subchapter T — cooperative) corporation composed of 11 member hospitals, including four hospitals affiliated with Samaritan Health Service. Each member hospital elects one member to the Board of Directors.	Service activities for the members of the cooperative and other hospitals.

*At the time of the filing of the First Amended Complaint, Samaritan Health Service was the "ultimate parent" of its affiliates (and the members of the Board of Directors of Samaritan Health Service were elected by the Board itself). Since the filing of the First Amended Complaint, SamCor, Inc. was organized as the "ultimate parent" of Samaritan Health Service and its affiliates.

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<u>Name of Organization</u>	<u>Type of Organization and Parent or Controlling Entity</u>	<u>Primary Activities</u>
Health Enterprises, Inc.	An Arizona (profit) corporation, 100% of the stock of which is owned by Samaritan Health Service.	Health care consulting, particularly with respect to participation of health care institutions in the federal social security program, and holding company for other profit activities.
Standard Surgical Supply Co.**	An Arizona (profit) corporation, 100% of the stock of which is owned by Health Enterprises, Inc.	Supplies medical equipment and perishables to health care providers.
Hospital Ambulance Service of Arizona, Inc.	An Arizona (non-profit) corporation, the Board of Directors of which is elected by Samaritan Health Service.	Operation of two Arizona ambulance companies.

The claims of Phoenix Baptist against the above listed defendants are set forth in Phoenix Baptist's Second Amended Complaint. [Exhibit A]

**Since the filing of the First Amended Complaint, Standard Surgical Supply Co. has changed its name to Health Care Resources, Inc.

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III.

Defendants-Appellees Before the Ninth Circuit Court of Appeals

The following more fully identifies the defendants-appellees and their relationships to the defendants remaining in the District Court:

<u>Name of Organization</u>	<u>Type of Organization and Parent or Controlling Entity</u>	<u>Primary Activities</u>
SHS Hospital Corporation	An Arizona non-profit corporation, the Board of Directors of which is elected by Samaritan Health Service.	Holding corporation for the joint venture interest of Samaritan Health Service in Lincoln Samaritan Hospital and Health Center.
JCL Hospital Corporation	An Arizona non-profit corporation, the Board of Directors of which is elected by John C. Lincoln Hospital.	Holding company for the joint venture interest of John C. Lincoln Hospital in Lincoln Samaritan Hospital and Health Center.
Lincoln Samaritan Hospital Health Center	Joint venture of SHS Hospital Corporation and JCL Hospital Corporation.	Construction of hospital to be operated by it.

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Respectfully submitted,

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REED, P.C.

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By _____

Michael C. Jones

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RULES OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RULE 21

Form and Publication of Disposition of Cases

(a) Opinions, Memoranda, Orders; Publication

Each written disposition of a matter before this court shall bear under the number in the caption an appropriate label, that is, OPINION, MEMORANDUM, or ORDER.

A written reasoned disposition of a case which is intended for publication is an OPINION of the Court. It may be an authored opinion or a per curiam opinion. A written reasoned disposition of a case which is not intended for publication is a MEMORANDUM. Any other disposition of a matter before the Court is an ORDER. An ORDER or MEMORANDUM shall not reveal its author, nor shall its authority be designated "Per Curiam."

PUBLICATION means making available for reporting by legal publishing companies, or for distribution to regular subscribers, written disposition which have been printed as slip opinions, or copies of which have been prepared by any other means.

Publication as a matter of course shall apply only to opinions.

(b) When Disposition To Be by Opinion

Subject to subsection (d) hereof, a case shall not be disposed of by written opinion for publication unless it:

(1) Establishes, alters, modifies or clarifies a rule of law, or

(2) Calls attention to a rule of law which appears to have been generally overlooked, or

(3) Criticized existing law, or

(4) Involves a legal or factual issue of unique interest of substantial public importance, or

(5) Relies in whole or in part upon a reported opinion in the case by a district court or an administrative agency, or

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(6) Is accompanied by a separate concurring or dissenting expression, and the author of such separate expression desires that it be reported or distributed to regular subscribers.

(c) Disposition as Precedent

A disposition which is not for publication shall not be regarded as precedent and shall not be cited to or by this court or any district court of the Ninth Circuit, either in briefs, oral argument, opinions, memoranda, or orders except when relevant under the doctrines of law of the case, res judicata, or collateral estoppel.

(d) Designation for Publication

A disposition other than an opinion may be specially designated for publication by a majority of the judges acting and when so published may be used for any purpose for which an opinion may be used. Such a designation should be indicated at the end of the disposition when filed with the Clerk by the addition of the words "For Publication" on a separate line.

(e) Preliminary Determination to Publish

The preliminary determination whether the disposition should be published should be made at the first conference following argument, or if the disposition is made without oral argument, before it is filed with the Clerk.

(f) Request for Publication

Publication of any unpublished disposition may be requested by letter addressed to the Clerk, stating concisely the reasons for publication. Such a request will not be entertained unless received within 60 days of the issuance of this court's disposition.

(g) Periodic Notice to Publishing Companies

A list of all cases that have been decided by written unpublished disposition will be made available periodically to legal publishing companies for publication. The list shall include a notation as to the concluding disposition in each case, such as, e.g., "Affirmed," "Reversed," "Dismissed," or "Enforced."